

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

JAMES ERIC FERGUSON,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2364-E

PERB Decision No. 1645

June 17, 2004

Appearance: William H. Hanson, Attorney, for James Eric. Ferguson.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on an appeal brought by James Eric Ferguson (Ferguson) from a Board agent's dismissal of his unfair practice charge. The charge alleged that the Oakland Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)¹ by transferring him from his teaching position at Castlemont High School to Cole Middle School (Cole).

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise noted, all statutory references are to the Government Code. EERA section 3543.5(a) states, in part:

It is unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

After reviewing the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, and Ferguson's appeal, the Board issues the decision below.

BACKGROUND

Ferguson is employed by the District as a teacher. He is fully credentialed at the secondary level in social sciences. He also holds a limited authorization in physical education that permits him to teach "Introductory Physical Education" and "Sports and Games" to students in the ninth grade level and below.

For the 2000-2001 school year Ferguson taught U.S. history and multicultural studies at Castlemont High School. Then, in 2001-2002 he accepted an assignment to teach five (5) physical education classes of ninth graders. For the 2002-2003 school year he was assigned three classes of physical education and two classes of study skills. Within the first two weeks of the 2002-2003 school year, the two study skills classes were removed from his schedule. This left him teaching only three classes. That lasted for about one month. He then was assigned to teach two U.S. history classes. The District created the U.S. history classes to relieve overcrowding. This replaced the study skills classes.

On October 28, 2002, Ferguson filed a grievance about his teaching assignment. The grievance alleged that his teaching schedule of three physical education classes and two U.S. history classes violated Article 12.10.1.6 of the collective bargaining agreement between the District and the Oakland Education Association (Association) of which Ferguson is a member. The collective bargaining agreement expires June 30, 2004.

Article 12.10.1.6 states, in relevant part:

If a teacher is reassigned to another grade level or subject area, that teacher shall not be assigned another grade level or subject area for at least two (2) years, unless by mutual agreement.

With regard to employer initiated transfers, the agreement states at Article 12.7.1, in relevant part:

If the principal/site administrator and/or other administrators initiate a transfer, the administrator shall arrange a conference with the unit member and an Association Representative to discuss the reasons a transfer is being considered.

Ferguson did not like the resolution of his schedule situation by the District assigning him the two U.S. history classes instead of the vacant periods. He appealed his grievance to Level Two. He then went off work on occupational leave on January 7, 2003. He did not return to the classroom the rest of the year.

The first of two meetings with Ferguson, the District and Association representatives in attendance was held on January 22, 2003. The second meeting was a Level Three grievance. At that meeting Ferguson, Assistant Superintendent, Lewis Cohen (Cohen), and Bruce Colwell (Colwell) from the Association were in attendance. At the Level Three meeting, the District agreed to place Ferguson at a middle school and to assign him to teach only physical education. Both Colwell and Cohen state there was an agreement that this would resolve the grievance. Ferguson believes he was to be able to choose the middle school to which he would be assigned.

Later in May 2003, it was determined there was only one opening at a middle school for a physical education teacher. As of June 20, 2003, there was still only one physical education teaching position opening at the middle school level. This was at Cole. Ferguson was given that assignment and sent notification of it that day. Ferguson then wrote to Cohen indicating his position that the grievance was not resolved because he believed he would be able to choose the middle school where he would be assigned. Cohen wrote to Ferguson that at the May 7, 2003, meeting it was agreed the middle school assignment would resolve the grievance.

The following September, Ferguson filed a new grievance. In it he alleged the 2002 grievance was not resolved. His Association representative advised Ferguson that an agreement had been reached at the May 7 meeting and the grievance was resolved.

Ferguson filed unfair practice charges against the District and the Association.

The Board agent issued a warning letter on February 11, 2004. The charge was timely amended and on February 18, 2004, a dismissal letter was sent to the parties.

DISCUSSION

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264 (No. Sacramento)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of

California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; No. Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; fn. omitted.]

Here, Ferguson has indicated he is the only person at the May 7, 2003, meeting who did not believe his grievance was resolved by his transfer to teach at a middle school. He believes there was no agreement because he did not get to select the middle school to which he would be transferred. The Association representative and the District representative have independently indicated there was a settlement of his grievance at that meeting and it was resolved by transferring him to a middle school. This was a resolution that Ferguson had indicated he wanted. Only six weeks after the meeting did he indicate he was not happy with the school where he was assigned and that he believed he would get to select the school. The District indicated that the only middle school opening within his credential parameters was at Cole.

We agree with the Board agent that the charge fails. There is no demonstration that the action by the District was in retaliation for the filing of the grievance. To the contrary, it was a settlement of the charges. There is, therefore, no demonstration that the transfer is an adverse action. It is undisputed that Ferguson agreed to teach only at the middle school level. There is some disparity about his understanding of whether or not he would get to choose at which middle school. He is the only one at the May 7, 2003, meeting who believes there was no agreement on settlement of his grievance. The Association can bind him to the agreement even if he is unhappy with the outcome.

The District, in line with the terms of the agreement from that meeting, placed Ferguson at the only middle school physical education teacher position opening it had. The Board must use an objective reasonable person standard in evaluating whether there was adverse action. Also, where employee's duties and compensation are the same in transfer situations, the employee must present some facts demonstrating that a reasonable employee would consider the transfer an adverse action. (Compton Unified School District (2003) PERB Decision No. 1518.) Ferguson continues to be paid the same salary and to teach classes he was previously assigned. There is no information provided as to why a reasonable person would find this adverse.

The charges fail to show any motive for the District action in transferring Ferguson other than the agreement reached at the May 7, 2003, meeting.

No facts are provided by Ferguson to indicate any rational for his transfer to Cole except that settlement. We agree with the Board agent that as Ferguson continues to be paid the same salary and continues to teach classes he was previously assigned and, in fact, asked to be assigned, there is no explanation of harm. Ferguson has never said why he does not want to teach at Cole. He has only indicated he thought he would get to select from a variety of

schools. The District has indicated that there is just one opening. Since Cole is the only middle school with an open position for which Ferguson had a credential, the Board agent is correct in saying, “the District’s decision to transfer him to Cole was simply made because no other site was available. As such, the transfer is not an adverse action under the Act.”

(Warning letter, February 11, 2004, p. 4.)

We also agree with the Board agent that the nexus is missing that would connect the grievance filed originally with the transfer to Cole. The transfer was due to the agreement discussed above. Unfortunately for everyone there was only one opening that fit with Ferguson’s credential and what he stated he wanted to teach, and he did not get to pick the school he wanted. The meeting with Ferguson, the District representative and Ferguson’s representative and the agreement formulated there is a more reasonable basis for the transfer to Cole than retaliation for the original grievance being filed.

The Board finds that Ferguson has failed to state a prima facie case and the charges must be dismissed.

ORDER

The unfair practice charge, as amended, in Case No. SF-CE-2364-E is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.